IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2) (b)
Description of case

Criminal Appeal No.1330 of 2001

Date of decision- 10-09-2003

For the approval of:-

Hon'ble Chief Justice S.H. Kapadia.

Hon'ble Mr. Justice Irshad Hussain, J.

-Whether the order/judgment should be sent to the reporters for reporting? (Yes)

-Whether the reporters be allowed to see the judgment ? (Yes)

(N.C. Melkani)
P.S.

C.J's Court

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Crl. Appeal No. 1330 of 2001

1. Afsar Khan,]
2. Ajhar Khan,]
   Sons of Asghar Khan,]
3. Nasiruddin S/o Ajijuddin]---- (since dead)
   Residents of Dyori, P.S. Sitarganj,]
   District Ninital.]---- Appellants

Vs.

State of U.P.]---- Respondents

Mr. Dharam Veer, Advocate on behalf of the appellant,]
Mr. D.K. Sharma, Addl. Govt. Advocate for the State.]

Coram: **Hon'ble S.H. Kapadia, C.J.,**
Hon'ble Irshad Hussain, J.

Date : 10th September, 2003:

ORAL JUDGMENT: [Per Hon. Chief Justice]

1. This appeal has been filed by Afsar Khan, Ajhar Khan and Nasiruddin, residents of village Dyori police station Sitarganj, district Nainital. All the three appellants were found guilty of offences U/s 302 read with Section 34 IPC. Each of them were sentenced to undergo imprisonment for life and penalty of Rs. 5,000/-, in default they were to undergo six months simple imprisonment. All the three appellants were also found guilty of offence U/s 201 IPC. Again each of them was sentenced to rigorous imprisonment for one year and liable to fine of Rs. 1,000/- each, in default they had to undergo simple imprisonment for one month. Nasiruddin has since died; appeal filed by him stands abated.

2. The prosecution case was as follows:-

On 01.09.1984, Jaswant Singh son of Darshan Singh (P.W.1) left his house at 2:00 p.m. to visit the appellants. P.W.1 was so told by his son Jaswant Singh. When Jaswant Singh did not return for a long time, P.W.1 went in search to the house of the appellants where P.W.1 was informed by the appellants that Jaswant Singh had come to their residence but had since left. P.W.1 searched for his son for two days and finally on 03.09.1984 at 4:50 p.m. he went to the above police station where he filed his complaint (Ext. Ka.1) about his missing son. On 04.09.1984 at 10:15 a.m., the body of the Jaswant Singh was found in the field of Baburam. Sub Inspector Vishram Singh (P.W.7) prepared the inquest report (Ext. Ka.2) on 04.09.1984 at 4:15 p.m. On 04.09.1984, Chappels were recovered under Recovery Memo (Ext. Ka.3). Thereafter S.I. Vishram Singh (P.W.7) prepared the site plan of the place of incident vide Ext. Ka.5 dated 04.09.1984. Thereafter the body was sent for post mortem on 04.09.1984 at 11:45 a.m. The post mortem was done by Dr. Nariyal (P.W.3) on 05.09.1984 at 12 noon at Haldwani. According to the post mortem report (Ext. Ka.4), the cause of death could not be ascertained and therefore the viscera was ordered to be preserved. However, was per the viscera report dated 01.01.1986 (Ext. Ka. 14) poison was detected. The accused were charged on 22.01.1987 of committing offence U/s 302 read with Section 34 IPC and Section 201 IPC by IV Addl. Session Judge, Nainital.

3. The prosecution examined P.W.1 Darshan Singh, father of the deceased Jaswant Singh, (P.W. 2) Darshan Singh S/o Hakim Singh Dr. Nariyal (P.W.3) who carried out he post mortem, P.W.4 Pritam Singh from adjoining village Deokali, P.W.5 Krishan Singh form the same village Dyoli, P.W.6 Kashmir Singh form different village Din Nagar, P.W.7 Vishram Singh the Sub Inspector of police station Sitarganj at the relevant date and P.W.8 Rajendra Prasad the head constable of Sitarganj police station on 03.09.1984 who registered the complaint of P.W.1 on that day, in support of the case of the prosecution. Of these witnesses, informant P.W.1, Darshan Singh, supported the prosecution case by stating that on 01.09.1984, his son

Jaswant had left the house stating that he was going to the residence of the accused and that he would return shortly; that when the deceased did not return P.W.1 went to the house of the accused and inquired about his son when he was informed by Afsar Kahan that Jaswant Singh had come to see them and had left that thereafter P.W.1 had searched for this son for two days and finally on 03.09.1984 at 4:50 p.m. he went to the police station filed the complaint (F.I.R.) Ext. Ka.1); that on 04.09.1984 he had accompanied the police with other villagers when the body of the deceased Jaswant Singh was found in the fields of Baburam at 10:15 a.m. That this is the case of circumstantial evidence. P.W.4, Pritam Singh, is witness of the circumstance. He has deposed that he was from adjoining village Deokali. That on 01.09.1984 at 8:30 p.m. he was returning form place of Baburam he had seen the three accused carrying the deceased which made him P.W.4) inquire and he was told by the accused that they were carrying the deceased, who was drunk, to his house; that this was narrated by (P.W.4) to P.W.1 after about three days when the body of the deceased was found. Krishna Singh 9P.W.5) is another witness of circumstances. He is from Dyori i.e. the same village. He says that he had seen the deceased on 01.09.1984 at 2:15 p.m. sitting on the Charpaai talking to Afsar Khan. That he had gone to the shop of Uttam to buy sugar and when he was going towards the shop of Yusuf he had seen the deceased talking to Afsar Khan. Kashmir Singh (P.W.6) is another witness of circumstances who has supported the prosecution. He is form a different village, Din Nagar. He says that he had gone for marketing to Sitarganj and on his return he passed through Dyori around 8:30 p.m. on 01.09.1984 when he saw the three accused standing besides the body of Jaswant Singh on the ground near Peepal tree which made him inquire of the three accused when he (P.W.6) was informed that Jaswant Singh was drunk and they were trying to take him back to his house. That when the dead body of Jawant Singh was found this incident had occurred to him and he had narrated it to P.W.1 on 04.09.1984. Vishram Singh (P.W.7) was Sub Inspector at

Sitarganj police station between 01.09.1984 to 12.09.1984. That he had recorded the statement of the witnesses; that he has prepared the site plan (Ext. Ka.10) of the place of the incident; that he prepared the site plan also of the house of he deceased (Ext. Ka.5); that on 04.09.1984 the police party had sea4rched for the body which was found on that very day at 10:15 a.m. in the field of Baburam. That, he took the photos of the dead body. That, around 4:05 p.m. he completed the inquest and made the inquest Report (Ext. Ka.2). That, he also took charge of the Chappals of the deceased at the site and prepared the Recovery Memo (Ex.t Ka.3). That, thereafter body was sealed and sent for post mortem. P.W.7 has further deposed that he was in-charge of investigations only upto 12.09.1984. That, investigation was transferred to S.I. J.P. Singh and thereafter it was transferred to S.I. Kartar Singh, who submitted the charge sheet on 27.02.1986. However, P.W.7 confirmed that entry in General Diary was made on 03.09.1984 at 4:50 p.m. by Rajendra Prasad (P.W.8) who was the Head Constable, on the information of P.W.1. Rajendra Prasad (P.W.8), in his deposition, has stated that on 03.09.1984 he had registered the case on the complaint of P.W.1; that on 29.04.1985 it was converted to offence U/s 302 IPC in his presence. That, the said change was recorded by Ishwar Datt, who was the Moharir in the police station in the presence of P.W.8.

4. The IV Addl. Sessions Judge, Nainital, after considering the evidence of the witnesses, came to the conclusion that all the three accused were guilty of offences U/s 302/34 IPC and offence U/s 201 IPC and accordingly all of them were convicted and each of them was sentenced to undergo imprisonment for life as stated above.

5. Being aggrieved by the impugned judgment, Afsar Khan, Ajhar Khan and Nasiruddin have come by way of appeal to this Court. During pendency of this appeal, Nasiruddin died, his appeal abates accordingly.

6. Heard Mr. Dharamveer Sharma, learned advocate for the appellants and Sri D.K. Sharma learned Addl. Govt. Advocate for the State.

7. We have carefully considered the evidence on record, the circumstances and the probabilities of the case.

8. Learned Advocate for the appellants submitted that motive has not been proved. We find merit in this argument. In his statement before the Court, P.W.1 has deposed that he was informed by one Amrik Singh that the deceased had an affair with the sister of the appellants. However, Amrik has not been examined. Moreover, this statement is not there in the complaint (Ext. Ka.1). Hence, it is an after thought. Hence, motive is not proved.

9. It has been argued by the learned Advocate for the appellants that evidence of P.W.1 is not credit-worthy. On the other hand, learned Addl. Govt. Advocate, Sri D.K. Sharma argued that the conduct of P.W.1 in reporting the matter to the police station on 03.09.1984 was natural. He argued that P.W.1 was the father of the deceased. He argued that P.W.1 searched for his son for two days before reporting the matter to the police. He further argued that this is a case of circumstantial evidence; that P.W.1 was not the witness of the last seeing of the deceased. He, therefore, contended that the evidence of P.W.1 is credit-worthy. Both P.W.1 and P.W.2 have deposed before the Court below that on 03.09.1984, P.W.1 had gone to the police station with a written complaint accusing the appellants of murder of his son but that P.W.7 had refused to register the complaint and that P.W.7 had asked P.W.1 to tear off the complaint as there was no eye-witness to the murder of his son. However, in this cross-examination, P.W.7 has denied the above statement of P.W.1 by saying that only complaint received by him was Ext. Ka.1 and no other complaint. Hence, there is a conflict in the case of the prosecution. Further, in the statement of P.W.1 before the court below, he has stated that P.W.4 and P.W.6 had informed him two days after post mortem dated 05.09.1984 that they had seen the deceased with the appellants on 01.09.1984 at 8:30 p.m. Therefore, till 07.09.1984, P.W.1 was not aware of murder. If so, one fails to appreciate how P.W.1 could have known about murder on 03.09.1984 when he alleges to have gone to P.W.7 with a written

complaint alleging murder of his son by the appellant. These points have not been discussed in the impugned judgment. Hence, we find the evidence of P.W.1 unreliable.

10. It is next contended that even the evidence of Pritam Singh (P.W.4) is not credit-worthy. On the other hand, it has been argued on behalf of the prosecution that P.W.4 has seen the accused carrying the deceased when he was told that the deceased was drunk. That, this incident was told by P.W.4 to P.W.1. That, P.W.5 had also last seen the deceased with the accused on 1st September 1984. Therefore, it was argued on behalf of the prosecution that P.W.4 and P.W.5 both had seen the deceased with the accused. It was, therefore, argued that the chain of circumstances got complete. We find merit in the argument advanced on behalf of the appellants that the evidence of P.W.4 and P.W.5 is weak and the conviction cannot be based on such evidence. Firstly, the conduct of this witness is unnatural. This witness claims to have seen the deceased on 01.09.1984 at 8:30 p.m. However, he says that he has not been to the police. P.W.4 was 32 years and the deceased was 19 and yet P.W.4 has deposed that P.W.4 knew the deceased when P.W.4 was school going. Moreover, P.W.4 is from a different village. It is surprising that although Jaswant Singh was missing for two days, P.W.1 did not lodge the complaint till 03.09.1984 (4:15 p.m.). P.W.1 has not named the relatives, whom he says he contacted, to know the whereabouts of his deceased son. Further, had P.W.4 met P.W.1 on 03.09.1984 and had told him about seeing his son then why is the said fact not motioned in the F.I.R. P.W.4 has stated before the court that on 01.09.1984 he had seen the deceased at 8:30 p.m. when he was returning form the place of Babu Ram. However, Baburam has not been examined. That, even though, the body was recovered form the field of Baburam, he has not been examined. Hence, we cannot reply on the evidence of P.W.4. It is important to mention that P.W.4 was from a different village. That, P.W.5, Krishna Singh was from the same village, P.W.5 had seen the deceased on 01.09.1984 at 2.15 p.m. and had told P.W.1 when P.W.1 had gone in search of his

son but this statement of P.W.5 does not find place in the F.I.R. We cannot convict the appellant on such weak evidence. There is no discussion in the impugned judgment on the evidence of these witnesses.

11. We also cannot rely on the evidence of P.W.6, Kashmir Singh who claims to have seen the deceased lying on the ground intoxicated surrounded by the appellants under the Peepal tree on 01.09.1984 at 8:30 p.m. because in cross-examination he has disposed that the Peepal tree is not there as it has been cut off. Peepal tree has a religious sanctity. The villagers would not have allowed cutting off such trees. Hence, the place where P.W.6 claims to have seen the deceased is not identified.

12. Lastly, we may mention that in the complaint (Ext. Ka.1) it is stated that the deceased was wearing a yellow shirt when left his house on 01.09.1984 whereas in the Inquest Report (Ext. Ka.2) the deceased had a black shirt. Hence, the evidence has tool many contradictions so as to hold the appellants guilty of above offences.

13. Learned Advocate for the appellants next contended that P.W.7, S.I. Vishram Singh, was in charge of the investigation till 12.09.1984, and thereafter the investigation was with S.I. Sri J.P. Singh upto 14.10.1984 and from 14.10.1984 to 27.02.1986 it was with Sri Kartar Singh who submitted the charge Sheet on 27.02.1986. That, according to P.W.8 the case was converted from missing to offence U/s 302 IPC only on 29.04.1985. Neither J.P. Singh nor Kartar Singh has been examined. Hence, we do not know on what basis is the case converted to murder U/s 302 IPC. P.W.7 had taken the above steps. But he had not found any crime. P.W.7 could not have converted the case to offence U/s 302 IPC. P.W.7 had denied of having received any complaint of murder from P.W.1 P.W.7 has denied Kashmir Singh (P.W.6) telling him about P.W.6 seeing the deceased in a drunken state. On the other hand, P.W.8, the Head Constable in his deposition has stated that till 29.04.1985, no case was registered U/s 302 IPC as there was no evidence of murder. Therefore, there is no evidence as to on what basis is the case U/s

302 IPC registered. There is no evidence as to on what basis the charge sheet was submitted on 27.02.1986, particularly when neither S.I. J.P. Singh nor S.I. Kartar Singh has been examined.

14. Before concluding , we would like to consider the last submission made on behalf of the prosecution. It was argued that in this case there was no complaint; there was only an entry in the General Diary (Ext. Ka.12), it is date 03.09.1984. It was argued that investigation was started only after receipt of the report from the Chemical Analyser under which poison was detected in the body of the deceased. It was argued that only after receipt of the report from the Chemicial Analyser the offence came to be registered U/s 302 IPC on 29th April 1985 and, therefore, there is no inconsistency between Ext. Ka.1, entry in the G.D. and statement of P.W.1 in court. We do not find any merit in this argument. Firstly, pursuant to the Ext. Ka.1, statements of the witnesses have been recorded by the I.O. Secondly, the officer, who converted the offence to Section 302 IPC, has not been examined. Thirdly, the Chemical Examiner has prepared his report on 01.01.1986 it was produced only in court. It was never a subject matter of investigation. Therefore, we have referred to the differences in the complaint (F.I.R.), entry in the G.D. and statement in the court as discussed above. There is not any merit in the argument of the prosecution that there was no investigation till 29.04.1985. For the aforestated reason we are of the view that benefit of doubt should go to the appellants.

15. In view of the above, this appeal is allowed and the impugned judgment and order of conviction and sentence passed by the learned IV Addl. Sessions Judge, Nainital convicting the appellants-accused for the offence U/s 302/34 IPC and U/s 201 IPC is quashed and set-aside. The appellants-accused are acquitted of the charges leveled against them. Fined, if paid, be refunded to the appellants. The appellants are on bail. Consequently, the bail-bonds stand cancelled and sureties discharged.

(Irshad Hussain, J.) **(S.H. Kapadia, C.J.)**